IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4628 OF 2007

Balkrishna Govind Joil & Anr. ..... .....Petitioners
V/s
Bajirao Dattatray Mungekar & Anr. ..... .....Respondents.

Mr.J.S.Chandnani i/by Mr.H.V.Kode, Adv. For the petitioners.

Mr.S.G.Joshi, Adv. For the respondent No.1

Mr.Bharat Joshi, Adv. For respondent No.2.

**CORAM: A.P.DESHPANDE, J.**
17/10/07

PC:

Rule. Rule made returnable forthwith.

Taken up for final hearing by consent of both the parties.

The petitioners take an exception to an order passed by the City Civil Court dated 26.6.06 in Notice of Motion No.4546/05 in Special Civil Suit No.3519/05.

2. The petitioners who are the plaintiffs in the trial Court entered into an agreement for purchase of flat with the respondent No.1/defendant No.1 for the consideration of Rs.12,86,250/-. The said agreement was duly registered. The petitioner-plaintiff paid substantial amount of Rs.11 lacs under the said agreement and a sum of Rs.1,66,425/- remained to be paid. The appellants have taken loan of Rs.8 lacs from Konkan Prant Sahakari Bank Limited by mortgaging the said flat with the bank. It is further case of the petitioners that they offered balance amount and demanded possession of the flat from the defendant No.1. Defendant No.1 avoided to complete the transaction. Hence the plaintiff instituted suit in City Civil Court at Bombay for

specific performance of the agreement dated 28.6.04 and prayed for possession of the flat. In the said 'suit the plaintiffs took out notice of motion for appointment of Receiver and for taking possession. A further prayer was also made to appoint the plaintiffs as agents of the Receiver and for being put in possession without any security or royalty. The said notice of motion was opposed by defendant No.1 stating that he had entered into co-development agreement with M/s.Vastu Nirman and the said Vastu Nirman had put third party in possession of the suit flat sometime in the month of August, 2005 by entering into an agreement dated 10.2.05. The Court appointed Court Receiver to take symbolic possession of the suit flat and to submit a report. The Court Receiver's representative visited the site and found someone else in possession and hence could not take formal possession. Thereafter the petitioner took out chamber summons and joined the defendant No.2 as party-defendant i.e. the person who was inducted in the premises by M/s.Vastu Nirman. The defendant No.2 claims to be in possession of the flat. The trial Court did not grant the prayer of the petitioner-plaintiff to remove respondent No.2 from possession of suit premises and hence this petition has been filed. Perused the order. I do not find any fault with that part of the order passed by the the City Civil Court which rejects the prayer of dispossession of the defendant No.2 and putting the plaintiff in possession. A party already in possession cannot be dispossessed at this stage. Thus the order directing taking of symbolic possession from defendant No.2 and an undertaking from him not to part with possession of the suit flat or create third party interest therein during pendency of the suit needs to be upheld. However the interest of petitioner-plaintiff needs to be safeguarded so as to compensate him in case of the plaintiffs succeed in the suit. It may not be lost sight of that on own showing of the defendants the agreement of the plaintiff is prior in point of time and

that the plaintiff has paid Rs.11 lacs out of the agreed consideration of Rs.12,80,250/- besides incurring expenses for registration and stamp duty that too after taking loan of Rs.8 lacs from the bank. Thus I am of the view that the defendant No.1 who is a builder should be directed to deposit sum of Rs.5,00,000/- as he or his co-developer is responsible for induction of defendant No.2 in the flat. Similarly as the defendant No.2 is in possession of the flat to the detriment of the plaintiffs' interest he too need to be directed to deposit sum of Rs.5,00,000/-. In the result writ petition is partly allowed. The impugned order stands modified by directing the respondent/defendant Nos. 1 and 2 to deposit sum of Rs.5,00,000/- each in the City Civil Court as and by way of security within a period of eight weeks from today. The total amount of Rs.10,00,000/- so deposited shall be invested by the City Civil Court in a nationalized bank initially for a period for one year and to be renewed thereafter if need be. Rule made absolute in above terms.

3. At this stage learned counsel for the respondent No.1 seeks stay of this order. Prayer is rejected.